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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 36

CLIFTON WHITLEY, ET AL., *Appellants,*

v.

JOHN BELL WILLIAMS, Governor of the State of Mississippi, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of Mississippi

(Three Judge Court)

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi is not reported. It is reprinted at Appendix 33. An earlier opinion in this case is reported *sub nom. Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act against the use by Mississippi of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on October 31, 1967, and the Notice of Appeal was filed in that court on October 31, 1967. On June 10, 1968, this Court set the case for hearing, consolidated it with *Fairley* v. *Patterson*, No. 25 (O.T. 1968), and *Bunton* v. *Patterson*, No. 26 (O.T. 1968), and postponed further consideration of the jurisdiction question until the hearing on the merits.

Jurisdiction below arose under 28 U.S.C. §§ 1343, 2201, 2202, and 42 U.S.C. §§ 1971(d), 1973c, and 1973j(f). A three-judge court was required by the explicit terms of section 5, 28 U.S.C. § 1973c, and a direct appeal to this Court was therefore authorized by 28 U.S.C. §§ 1253 and 1973c. Since this Court has raised and postponed the question of the three-judge court's jurisdiction, it seems appropriate to set forth appellants' position in greater detail.

In section 5, Congress took the extraordinary step of shifting to those States covered by the Act the burden of proving that any new voting practice or procedure was free from discrimination. The method of satisfying this burden is set forth in the first sentence of section 5—a declaratory judgment in the District of Columbia—as is the right of individuals not to have a new voting practice or procedure which has not been cleared enforced against their right to

vote. Following an intervening proviso, section 5 concludes by saying plainly that "any action under this section" shall be heard by a three-judge court, with a direct appeal to this Court.

Other federal jurisdictional statutes, such as 28 U.S.C. § 1331 (federal question cases) and 28 U.S.C. § 1343(4) (civil rights cases), refer to matters arising under, or relief sought under, the laws of the United States. And it has been traditionally held that the word "under" in those statutes refers not necessarily to a form of action literally specified in a statute but to a right explicitly or implicitly created by the statute.[1] Against this background the use of the broad phrase "any action under this section" in section 5 must include any action to enforce a right created by the section—including the right to prevent enforcement of a state statute not cleared in the manner specified; if Congress had meant only that "any declaratory judgment instituted by a State under this section" should be heard by a three-judge court, presumably it would have said so.

This view of the structure and the plain meaning of section 5 is supported by a glance at the considerations generally governing the jurisdiction of three-judge courts. As recently restated by this Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), "the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of

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[1] See Gully v. First National Bank, 299 U.S. 109 (1936); Bill v. Hood, 327 U.S. 678 (1946); Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951).

the lower federal courts,"[1a] so that it should be done only where necessary "to safeguard important state interests"—e.g., to avoid "the worrisome possibilities that economic or political predilections will find their way into a judgment." 382 U.S. at 127-28.

A statute which raises these "worrisome possibilities" more clearly than section 5 can hardly be imagined. Section 5 goes to the heart of the Fifteenth Amendment, creates an extraordinary remedy to protect the basic but explosive right to vote without discrimination, and does so only in relation to a handful of states. One can hardly doubt the aptness of requiring a three-judge court to decide all questions dealing with section 5, and when one in fact sees a provision for a three-judge court written into the statute, it must require a certain kind of hardiness to suggest that that means three judges are required to put a Mississippi statute into effect, but only one is needed to block it.[2]

[1a] Quoting Justice Frankfurter in Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92 (1960) (dissenting opinion).

[2] Appellants further submit that a three-judge court was required by 28 U.S.C. § 2281, since their Complaint raised substantial constitutional questions under the Fourteenth and Fifteenth Amendments. The 1966 decision did not pass on those nor on the statutory questions. In 1967 a stipulation removed the constitutional questions from the purview of the decision on the particular motion in question. The constitutional questions remain in the case, though, and the judgment of the court below can perhaps best be analogized to a partial summary judgment. Accordingly a three-judge court was properly convened and it has not yet completed its consideration of the constitutional questions.

STATUTES INVOLVED

The statutes involved in the case are:

(1) section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of

the United States Code and any appeal shall lie to the Supreme Court."

(2) section 3260 of the Mississippi Code of 1942, as amended in 1966 by House Bill No. 68. This is the statute which appellants submit is barred by section 5 of the Voting Rights Act; its text is set forth at pages 1a-3a of this Brief, in both its prior and present versions.

QUESTIONS PRESENTED

1. Whether a state statute which makes it more difficult for voters to choose independent candidates by (a) providing that one who votes in a party primary may not be an independent candidate for public office, (b) increasing ten-fold the number of voters who must sign an indepependent candidate's petition and requiring that each voter personally sign his name and list his precinct, and (c) making the qualification date for candidates substantially earlier, is a statute dealing with "a voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether such a statute violates section 5 of the Voting Rights Act, which provides that no statute within the Act can be enforced in the absence of a declaratory judgment that the statute is free of racial discrimination or a sixty-day acquiescence by the Attorney General, neither of which occurred here.

3. Whether, if the answer to the first two questions is "yes", those 1967 Mississippi elections in which voters were deprived of the right to vote for candidates who failed to qualify solely because of the enforcement of the new tests can be allowed to stand.

STATEMENT OF THE CASE

Mississippi is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] Under section 5 of that Act, 42 U.S.C. § 1973c, if it seeks to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The State may also enforce the procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

In 1966, the Mississippi Legislature amended section 3260 of the Mississippi Code of 1942—which provides how a candidate for state office gets a place on the ballot—to make it more difficult for independent candidates to qualify for election by the voters:

(1) No person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election;

(2) the numbers of signatures of qualified electors needed on the petition of an independent candidate is substantially increased, in most cases ten-fold;

(3) each qualified elector must personally sign the petition for an independent candidate and must include his polling precinct and county;

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[3] 30 Fed. Reg. 9897 (August 6, 1965).

(4) the time for filing a petition as an independent candidate is now 60 days before party primaries rather than 40 days before the general election.[4]

It has been stipulated that the State of Mississippi neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new test to the Attorney General before putting it into effect. See Appendix, 38.

Appellants were qualified electors and prospective independent candidates for state office in 1966 who were kept off the ballot, although they satisfied the pre-1966 provisions of section 3260, because they did not have the number of signatures required by the 1966 amendment to section 3260.[5] On October 20, 1966, appellants filed a class action on behalf of themselves and all others similarly situated, requesting an injunction against enforcement of the new procedures of section 3260 on the ground that section 5 of the Voting Rights Act barred such enforcement and that the new procedures violated the Fourteenth and Fifteenth Amendments. A three-judge district court exercised its equity jurisdiction and ordered appellants placed upon the ballot for the 1966 election, but without reaching any of the constitutional or statutory issues presented by the suit. *Whitley* v. *Johnson,* 260 F. Supp. 630 (S.D. Miss. 1966).

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[4] In 1968 this meant independent candidates had to qualify by April 5 rather than September 26.

[5] And in two cases on the additional ground that the candidate had *run* in the primary, even though the new § 3260 refers only to those who have *voted* in the primary.

In 1967, the Secretary of the State of Mississippi applied the procedures of new section 3260 to bar other members of the class represented by appellants. The record shows sixteen examples of candidates kept off the ballot. All are Negroes. These examples show that each of the procedures of the new section 3260 described above had the effect of keeping at least one candidate off the ballot in the Mississippi general elections of 1967.[6]

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[6] 1. Mrs. Fannie Lou Hamer, Sunflower, State Senate, voted in Democratic primary.
2. Philip McKinney, DeSoto, Supervisor Beat 4, filed too late.
3. Dan Lofton Mason, Hinds, Supervisor Beat 2, voted in Democratic Primary.
4. L. C. Leach, Hinds, J. P. Beat 2, Post 1, voted in Democratic Primary.
5. Rev. J. L. Brown, Hinds, Supervisor, Beat 3, voted in Democratic Primary.
6. Johnnie Ross, Hinds, J. P. Beat 3, voted in Democratic Primary.
7. John Daniel Wesley, Holmes, J. P. Beat 5, voted in Democratic Primary.
8. George Raymond, Madison, State Rep. Post 1, insufficient signatures on petition—no precincts.
9. Bennie L. Thompson, Madison, Supervisor Beat 3, insufficient signatures on petition—no percincts.
10. Ellis Saddler, Madison, J. P. Beat 3, Post 1, insufficient signatures on petition—no precincts.
11. Floyd Moore, Madison, J. P. Beat 3, Post 2, insufficient signatures on petition—no precincts.
12. H. L. Gray, Sr., Madison, Constable Beat 3, Post 1, insufficient signatures on petition—no precincts.
13. Hubert McDonald, Madison, Constable Beat 3, Post 2, insufficient signatures on petition—no precincts.
14. Rev. L. D. Coleman, Quitman, Supervisor Beat 3, filed too late.
15. Rev. Sammy Rash, Bolivar, State Rep. Post 2, no post listed on petition.
16. Harold T. Magee, Pike, Constable Beat 1, voted in Democratic primary.

Appendix 19-33.

As a result appellants moved for a permanent injunction against enforcement of the new procedures of section 3260, and in order to obtain relief in time for the 1967 elections, stipulated that the only issue before the court at that time was whether the Voting Rights Act barred enforcement of section 3260. Appendix 38-39. As so stipulated the court below took briefs and denied the injunction on the ground that the new section 3260 did not impose "a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within the meaning of section 5 of the Voting Rights Act:

> "The Mississippi statute under consideration (House Bill 68) is directed solely to the qualifications of candidates, whereas Section 5 has reference to the qualifications of voters. We do not believe that the Mississippi statute is of the kind which Section 5 of the Voting Rights Act of 1965 was designed to prevent. The Mississippi statute under attack does not appear on its face to be one designed or intended to effect a discrimination or qualification relating to the person or voting rights of the individual. The Act does not deal with voting but deals with elections, and more particularly the candidates; therefore, it does not impinge upon Section 5 of the Voting Rights Act of 1965."

A motion presented to Mr. Justice Black for an injunction pending appeal in this Court was denied, and the 1967 general elections were held without the people of the State of Mississippi being permitted to vote for a large number of candidates who qualified under the tests of old section 3260 but not under those of the 1966 amendment. This appeal followed.

SUMMARY OF ARGUMENT

Those states, including Mississippi, which have traditionally deprived Negroes of the right to vote have displayed great ingenuity in raising new barriers of discrimination to circumvent successive checks imposed by Congress and the courts. In passing the Voting Rights Act of 1965, therefore, Congress not only barred these states from using "any test or device" as a prerequisite for voting, but also prohibited them from making any changes in their voting and election laws without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against Negroes.

The Mississippi statute involved in this case, House Bill No. 68, limited voters' opportunities to vote for independent candidates by making it more difficult for such candidates (who, as this Record shows, Appendix 19-33, would often or always be Negroes) to get on the ballot, and did so in part by provisions which limited the class of voters eligible to vote in party primaries and which required that signers of independent candidates' petitions sign personally.

The court below held that this statute was not subject to section 5 of the Voting Rights Act because it "does not deal with voting but deals with elections." Appellants submit that the Voting Rights Act does not permit such a distinction and that it is precisely statutes like House Bill No. 68 which Congress intended to submit to federal scrutiny for discriminatory purpose or effect. The terms of the Act, its purposes, its legislative history, and prior cases in related areas combine to compel the conclusion that Congress showed enough foresight to reach this newest

bold attempt by Mississippi to deny Negroes the right to cast effective votes.

ARGUMENT

Few activities in the past century have occupied the federal government and the Southern states more than attempts to enforce and evade, respectively, the guarantees of the Fifteenth Amendment.[7] In the past decade Congress itself has acted to enforce these guarantees in 1957, 1960, 1964, 1965, and now again in 1968.[8] By 1965, when the Voting Rights Act was passed, Congress had ample experience to predict, and wish to avoid, the "game of cat and mouse which the State legislatures have played for so long." 111 Cong. Rec. 10727 (Senator Tydings). The result was the trigger of sections 4 and 5, which not only outlawed the primary evil at hand—discriminatory tests and devices—but impeded the adoption of new engines of discrimination by prospectively suspending all new voting laws of the affected states—including Mississippi.

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[7] "The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, and Myers v. Anderson, 238 U.S. 368. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, and Terry v. Adams, 345 U.S. 461. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933; Alabama v. United States, 371 U.S. 37; and Louisiana v. United States, 380 U.S. 145." South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

[8] 42 U.S.C. §§ 1971, 1973 et seq., 1974 et seq., 2000f; Public Law 90-284 (April 11, 1968).

In House Bill No. 68, Mississippi found a sophisticated way of taking advantage of the conviction of many Negro voters that only votes for independent candidates, especially Negroes, could effectively bring responsive government.

By disqualifying prospective independent candidates from voting in party primaries (while allowing interparty cross-overs), and by multiplying voters' difficulties in getting their candidates on the ballot as independents, House Bill No. 68 went far toward nullifying the votes of Negroes whom Mississippi could no longer prevent from going to the polling places.

Appellees seek to create a distinction between voting and choosing public officers, arguing that "determination of the method by which a public official is to be elected is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965." Motion to Dismiss or Affirm, 5-6. At the same time appellees recognize that the Act is designed to enforce the Fifteenth Amendment, and say:

> The Act does not grant the right to vote. It *only* prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed. *Id.* at 4. [emphasis added].

But the right to vote protected by the Act is not merely an abstract right to cast a ballot, but includes all steps necessary to make one's vote effective. The Act itself defines voting in section 14(c)(1):

> "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including,

> but not limited to . . . casting a ballot, and having such ballot counted." 42 U.S.C. § 1973*l*.

Moreover the reapportionment cases have confirmed the fact that, as stated in *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964):

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The legislative history too supports a broad view of the scope of section 5. Thus the Attorney General said "the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th Amendment by a State should also be subjected to judicial review."[9] Senate Hearings 237. And Senator Mansfield said:

> "FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which was precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such new qualifica-

[9] Thus the language of section 5 is clearly broader than that of section 4, and the mere fact that the applicability of section 5 depends on violations of section 4 does not mean they are the same.

> tions will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a commonsense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests takes effect." 111 Cong. Rec. 8297.

Finally, and perhaps most important, the Voting Rights Act was an attempt to enforce the guarantees of the Fifteenth Amendment fully, after earlier measures had failed. Its coverage is thus as broad as that of the Fifteenth Amendment itself. And this Court's Fifteenth Amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

Thus the right to vote has been held to include choosing candidates in party primaries[10] or in primaries of private political clubs,[11] whether these primaries were administered by the State or not,[12] as well as redistricting to deny Negroes the vote in a particular municipality[13] and extending terms of incumbent

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[10] Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).

[11] Terry v. Adams, 345 U.S. 461 (1953); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

[12] Smith v. Allwright, 321 U.S. 649 (1944). See United States v. Classic, 313 U.S. 299 (1943).

[13] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

officials to curtail voting opportunities.[14] The right to vote comprises all these steps because each is an "integral part of the procedure of choice" of representatives. *United States* v. *Classic*, 313 U.S. 299, 318 (1943).

In *Classic* this Court went on to say that the primary 'involves a necessary step in the choice of candidates for election as representatives." 313 U.S. at 320. Choosing independent candidates, the subject of the Mississippi statute involved here, is in effect the independent voter's primary, and this Court should be slow to hold that the Voting Rights Act was not intended to protect Negro voters against a discriminatory scheme which is simply the counterpart of those which came before this Court so frequently a generation ago. Years of white domination of party primaries convinced many Negroes that their votes could not be effectively cast in such primaries, but only on behalf of independent candidates. The State of Mississippi has responded by raising the already discriminatory barriers to voting for independent candidates.[15] While this route to effective voting is not completely cut off by new section 3260, the statute does deal with voting and that alone, even without the strong suggestion here of a purpose to abridge Negroes' voting rights, is enough, under section 5, to require the state to submit the statute to federal scrutiny before enforcing it.

The only case dealing with the coverage of section 5, *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966), supports appellants' arguments here. There

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[14] Sellers v. Trussell, 253 F. Supp. 915 (M.D. Ala. 1966).

[15] In contrast to the requirements for independent candidates a party holding a primary automatically gets its candidates on the ballot, no matter how many votes were cast in the primary.

the Alabama legislature had extended for two years the terms of office of officials who had been elected at a time when Negroes were being illegally deprived of the right to vote. According to Judge Rives, the statute both violated the Fifteenth Amendment and came within section 5 since "to freeze elected officials into office is, in effect, to freeze Negroes out of the electorate."[16] If depriving Negroes of opportunities to vote, and more particularly to vote for candidates of their choice, by making elections less frequent comes within section 5, it should follow that depriving Negroes of opportunities to vote for candidates of their choice by making it difficult for these candidates—likely to be Negroes—to be on the ballot likewise comes within section 5.[17]

As to two of the provisions of the new law, the coverage of section 5 is even clearer. One change bars prospective independent candidates from *voting* in a party primary. (Nothing prevents a prospective independent from *running* in a party primary.) That such a provision deals with voting is shown by *Bowen* v. *Williams*, 238 Miss. 57, 117 So. 2d 710 (1960), where a somewhat similar statute requiring voters in primaries to abide by the primary results was held to deal with voting.

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[16] 253 F.Supp. at 917. Judge Johnson would not have reached the question of the applicability of section 5 of the Voting Rights Act, but concurred in holding that the Alabama statute violated the Fifteenth Amendment. Since the language of both the Fifteenth Amendment and the Voting Rights Act is in terms of denying or abridging the right to vote, as discussed above, the two holdings seem to amount to the same thing. Judge Grooms dissented from both holdings.

[17] In Allen v. State Board of Elections, 268 F. Supp. 218 (E.D. Va. 1967), *juris. postponed*, No. 3 (O.T. 1968), the section 5 issue was not raised below.

A second change requires that each petitioner on behalf of an independent candidate personally sign the petition. Signing a petition to get a candidate on the ballot is the exact counterpart of voting for a candidate in a primary. Furthermore, this provision is open to the construction that handwritten signatures are required even from illiterates and, as such, clearly violates section 4 of the Voting Rights Act. 42 U.S.C. 1973b.

It need not be shown that the new provision discriminates in order to enjoin its enforcement; all that need be shown is that it deals with voting. Since at that point the federal authorities have jurisdiction, the question of what provisions do deal with voting should also be submitted to those authorities, at least in the case of provisions "arguably subject" to that jurisdiction. Compare *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959).

The proper relief here would have been to enjoin the elections affected by the state's enforcement of the statute: *Bush* v. *Martin,* 224 F. Supp. 449 (S.D. Tex. 1963), *aff'd,* 376 U.S. 222 (1964). Having sought such relief, appellants are now entitled to have all improperly-held elections set aside, *Hamer* v. *Campbell,* 358 F.2d 215 (5th Cir. 1966); *Bowen* v. *Williams, supra,*[18] and the use of the statute in subsequent elections enjoined.

[18] The new elections would not be futile jestures. In the 1967 general elections, (held after the entry of judgment below) seven Negroes won office as independent candidates.

CONCLUSION

House Bill No. 68 is no more than an inventive means of maintaining white political supremacy in Mississippi which has resulted from denying Negroes the vote for many years. Yet because the statute does not say in so many words that former slaves may not vote or that the state voting registrar may register whomever he pleases, it is claimed that this statute does not deal with a voting practice or procedure. Appellants submit that this sort of "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" [19] was precisely what Congress expected from the State of Mississippi. Mississippi should not be allowed to thwart Congress by the devious expedient of calling a spade a shovel and saying they are different.

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[19] South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). What this Court meant was well described by the Attorney General, testifying before the House of Representatives:

> "*Mr. Katzenbach:* The justification is simply this: Our experience in the areas that would be covered by this Bill has been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. I refer, for example to the new voter qualifications that have been put into statutes of Louisiana, Mississippi and Alabama following the enactment of the 1964 Act which made things more difficult for people to vote . . . .
>
> "The same thing was true, as the Chairman may recall, in Louisiana, at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Everytime the judge issued a decree, the legislature . . . passed a law to frustrate that decree." House Hearings 60.

For the reasons stated above, this Court should assume jurisdiction, reverse the judgment of the court order new elections for those plaintiffs determined on remand to be eligible, and enjoin future enforcement of House Bill No. 68.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

The text of section 3260, as it was before and after the 1966 amendment, follows. Brackets indicate material deleted by House Bill No. 68; italics indicate material added by House Bill No. 68:

3260. Ballots; what to contain.

The ballot shall contain the names of all candidates who have been put in nomination, not less than forty (40) days previous to the day of the election, by the primary election of any political party. There shall be printed on the ballots the names of all persons so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. *No person who has voted in a primary election shall thereafter have his name placed upon the ballot as an independent candidate for any office to be determined by the general election; any independent candidate must qualify on or before the time established by statute for qualification of candidates seeking nominations in primary elections.* The commissioner shall [also] have printed on the ballot in any [general or special] election the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office *as an independent candidate* by a petition *filed on or before the statutory time* [with said commissioner not less that forty (40) days prior to the election], and signed by not less than the following number of qualified electors:

(a) For an office elected by the state at large, not less than [one thousand (1,000)] *ten thousand (10,000)* qualified electors.

(b) For an office elected by the qualified electors of a supreme court district, not less than [three hundred (300) qualified electors] *three thousand five hundred (3,500)* qualified electors.

(c) For an office elected by the qualified electors of a congressional district, not less than [two hundred (200)] *two thousand (2,000)* qualified electors.

(d) For an office elected by the qualified electors of a circuit or chancery court district, not less than [one hundred (100)] *one thousand (1,000)* qualified electors.

(e) For an office elected by the qualified electors of a county, a senatorial *district,* [or floatorial district,] *a supervisors district;* or a municipality having a population of one thousand (1,000) or more, not less than *ten per cent (10%) of the qualified electors of said county, senatorial district, supervisors district, or municipality,* or not less than *five hundred (500)* [or not less than fifty (50)] qualified electors, *whichever is the lesser.*

(f) For an office elected by the qualified electors of a supervisors district or a municipality having a population of less than one thousand (1,000) [not less than fifteen (15)] *ten per cent (10%)* of the qualified electors *of said supervisors district or municipality.*

Each elector shall personally sign said petition which signature shall not be counted unless same includes his polling precinct and county.

There shall be attached to each petition above provided for upon the time of filing with said commission, a certificate from the appropriate registrar or registrars showing the number of qualified electors appearing upon each such petition which the registrar shall furnish to the petitioner upon request.

[Unless the petition required above shall be filed not less than forty (40) days prior to the election,] *Unless the*

petition required above shall be filed not later than the time required for primary elections, the name of the person requested to be a candidate, unless nominated by a political party, shall not be placed upon the ballot. The ballot shall contain the names of each candidate for each office, and such names shall be listed under the name of the political party such candidate represents as provided by law and as certified to the circuit clerk by the State Executive Committee of such political party. In the event such candidate qualified as an independent as herein provided, he shall be listed on the ballot as an independent candidate.

Provided, however, that municipal general elections should be held in the manner provided by Section 62, Chapter 491, Laws of 1950, and the names of persons nominated in the primary elections in muncipalities, as provided by section 63 of said chapter 491, Laws of 1950, shall be placed upon the ballot in such general municipal elections, notwithstanding any limitation of time which may be otherwise imposed herein.

Provided further, however, that nothing in this act shall prohibit special elections to fill vacancies in either house of the legislature from being held as provided in Section 3295, Mississippi Code of 1942, as amended. And in all elections conducted under the provisions of Section 3295 the commissioner shall have printed on the ballot the name of any candidate who, not having been nominated by a political party, shall have been requested to be a candidate for any office by a petition filed with said commissioner not less than five (5) days prior to the election, and signed by not less than fifty (50) qualified electors.